UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA
CASE NO. 1:13-CV-00046

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. WOMBLE CARLYLE SANDRIDGE & RICE, LLP, Defendant.	)	**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant Womble Carlyle Sandridge & Rice, LLP ("Womble Carlyle" or the "Firm") has moved for summary judgment regarding all claims brought by plaintiff Equal Employment Opportunity Commission ("EEOC) on behalf of Charlesetta Jennings. In this lawsuit, the EEOC alleges that the Firm discriminated against Jennings because of her disability, breast cancer and lymphedema, by failing to provide reasonable accommodations for her lifting limitations in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq*. ("ADA").

The evidence shows that Jennings was unable to perform the essential functions of her Support Services Assistant job, with or without reasonable accommodations. Accommodating Jennings' lifting restrictions would have necessitated eliminating essential job functions and reallocating them to other employees, which the ADA does not require. Accordingly, no genuine issue of material fact exists and the Firm is entitled to judgment as a matter of law.

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STATEMENT OF FACTS

Womble Carlyle's Support Services Department.

The Support Services department provides back-office support functions throughout the Firm's Winston-Salem locations. (Pierberg Decl. ¶8; Weese Decl. ¶8). The centralized Support Services Center is housed in Womble Carlyle's main office facility at One West Fourth Street, and more limited support services are provided at the Liberty Plaza and Winston Tower sites. (Id.).

Support Services Assistants perform basic, entry-level operating functions at the Firm. (Pierberg Decl. ¶¶9-10, Ex. A; Weese Decl. ¶¶10, 20, Ex. A). This multi-task job involves operating copy and scanning machines, shipping and receiving products and supplies, handling incoming and outgoing correspondence, performing basic maintenance and repair of copiers, making offsite pick-ups and deliveries, responding to service calls, binding documents, conducting quality control checks, carrying out basic housekeeping/hospitality functions, working in the internal message center, and performing other duties as assigned. (Id.; Jennings Dep. I at 40-44, 92, 133-54, Ex. 12).

Even though some Support Services Assistants are assigned certain duties more frequently than others, each must be able to rotate among the various job functions and perform them independently. (Pierberg Decl. ¶¶11, 15; Weese Decl. ¶¶11, 15). Due to the nature of the Firm's business, it is impossible to anticipate all of the tasks that each Support Services Assistant might need to perform on a day to day basis. (Pierberg Decl. ¶14; Weese Decl. ¶14; Jennings Dep. I at 53-54, 93-96).

Jennings' Employment Background.

The Firm initially hired Jennings in April 2000 as an Office Services Assistant. (Isley Decl. ¶7). Womble Carlyle's former affiliate, FirmLogic, subsequently spun off from the Firm and hired Jennings in that same job position on November 1, 2000. (Id.). Womble Carlyle reintegrated FirmLogic in late 2007 and, in January 2008, the Firm hired some of the former FirmLogic employees, including Jennings, as Support Services Assistants. (Isley Decl. ¶7; Jennings Dep. I at 44-45, 78-81, 84-85, Exs. 7, 9).

Prior to 2008, Jennings had been assigned to work at Liberty Plaza, along with her supervisor Darryl Smith, who managed that location. (Pierberg Decl. ¶20; Jennings Dep. I at 36-40). When she became a Firm employee in early 2008, her job responsibilities essentially remained the same. (Jennings Dep. I at 93-96). For a period of time, Jennings divided her work schedule between Liberty Plaza and the Firm's centralized Support Services operations at One West Fourth. (Pierberg Decl. ¶20; Jennings Dep. I at 101-02).

The Firm made a number of other operational changes in 2008 to reduce costs and streamline services as a result of the economic downturn. (Pierberg Decl. ¶16; Weese Decl. ¶16). These cost-saving measures included eliminating a number of positions within Support Services, which reduced the number of Support Services Assistants by almost half. (Id.; *see also* Jennings Dep. I at 100).

In July 2008, Jennings was diagnosed with breast cancer. (Jennings Dep. I at 160). She took a month-long leave of absence from August to September 2008 to undergo surgery. (Id. at 161). Shortly after she returned from leave, Christina Weese (formerly Chapman) assumed the Support Services Manager position and became Jennings' direct supervisor. (Weese Decl. ¶24; Jennings Dep. I at 164-65). Weese, in turn, reported to Director of Administration Yvonne Pierberg. (Pierberg Decl. ¶4).

Meanwhile, as part of the 2008 cutbacks, the Firm had determined that only one employee would be assigned to Liberty Plaza on an ongoing basis. (Pierberg Decl. ¶21; Weese Decl. ¶22). This meant that Jennings was to transfer to the centralized Support Services Center at One West Fourth. (Id.). Following her leave of absence, however, Jennings expressed concerns about transferring right away to the larger work group. (Pierberg Decl. ¶23; Weese Decl. ¶24; Jennings Dep. I at 166-171). She believed that her ongoing cancer treatments might compromise her immune system, causing her to be more susceptible to colds and other illnesses. (Id.). Even though she never presented a doctor's note substantiating this concern, the Firm allowed Jennings to continue working at Liberty Plaza for several more months. (Id.).

Jennings transferred to One West Fourth in December 2009. (Pierberg Decl. ¶24; Weese Decl. ¶24; Jennings Dep. I. at 170). She received training on functions she had not previously performed at Liberty Plaza, such as filling in for the main lobby receptionist and internal message center operator, working at Winston Tower, performing more complicated scanning work, and making mail and supply runs to the various office floors. (Pierberg Decl. ¶25; Weese Decl. ¶26; Jennings Dep. I at 101-05, 123-26, 186-88). In addition to her duties at One West Fourth, Jennings also continued to fill in as needed at Liberty Plaza. (Id.).

Jennings' Shoulder Injury and Lifting Restriction.

On June 8, 2010, Jennings injured her shoulder while lifting heavy boxes at Liberty Plaza. (Jennings Dep. I. at 145-47, 188-89). She completed an Injury/Accident Report in which she described her injury as follows:

> I had to tape up and move about 14 boxes ranging in weight from 32 to 38 lbs each in addition to moving some paper boxes weighing 50 lbs each from one location to another. As a result of Breast Cancer, a lymph node was removed from my left arm and causes pain & swelling when I continuously lift objects over 20 lbs
> . . .
> I was out June 9th and 10th 8 hrs each and June 11 4 hrs because when I returned to work, I had to move some more boxes when my shoulder was already still swollen and I could feel the pain returning.
> . . .
> I had just been to the doctor (oncologist) the week before and was asking why my shoulder swells from time to time (always when I am working where I have to do heavy lifting). I was told that because that lymph node was remove [sic], it will swell and cause pain when I lift more than my limit.

(Weese Decl. ¶¶28-29, Ex. B; Jennings Dep. I at 188-96, Ex. 21).

At that time, neither Weese nor Pierberg knew that Jennings had a lifting limitation in place. (Pierberg Decl. ¶27; Weese Decl. ¶30). Pierberg consulted human resources to determine whether any such work restriction existed. (Id.). At that point, Womble Carlyle had on file only two outdated lifting restrictions for Jennings:[1] a doctor's note dated September 8, 2008, indicating that she should not lift more than 10 pounds until further notice, and another one dated May 6, 2009, stating that she should

[1] Jennings believes her doctors implemented additional lifting restrictions at various times during her tenure with Womble Carlyle. (Jennings Dep. I 196-203, 225-26). The Firm's files regarding Jennings contain no such documentation. (Isley Decl. ¶30).

not lift more than 10 pounds for seven days and may resume her regular duties on May 14, 2009. (Isley Decl. ¶9A-B, Exs. F-G; Jennings Dep. I at 163-64, 171-72, Exs. 15-16).

In June 2010, Jennings was asked to provide an updated doctor's note indicating what, if any, lifting restriction was in place. (Isley Decl. ¶10; Lawrence Dep. 15-18; Jennings Dep. I at 204-05). Shortly thereafter, the Firm received a note from Jennings' doctor dated June 15, 2010, stating that she should not lift more than 10 pounds. (Isley Decl. ¶11, Ex. H; Lawrence Dep. 18-19, Ex. 11; Jennings Dep. I at 204-205, Ex. 22).

Jennings' Ability to Perform Essential Job Functions.

After learning of the updated doctor's note, Pierberg and Weese assessed what Support Services functions Jennings could (and could not) perform, given her lifting restriction. (Pierberg Decl. ¶29; Weese Decl. ¶32, Ex. C). They determined that Jennings would not be able to perform the following Support Services functions:

Filling in at Liberty Plaza or Winston Tower. While working at these Firm locations, Jennings would generally be the only Support Services Assistant onsite and could not perform the necessary tasks that involved lifting outside her limitation. (Pierberg Decl. ¶33A; Weese Decl. ¶33A).

Copying and Scanning Documents. Most copying and scanning jobs done in the Support Services Center on a daily basis involve boxes or redwells full of documents that weigh more than Jennings' lifting restriction. Jennings was not able to lift the boxes of papers or documents as needed to complete the copying or scanning work, unless someone else brought the documents to her in the Center copy room. (Pierberg Decl. ¶33B; Weese Decl. ¶33B).

Managing Supplies. Support Services Assistants must lift and unpack the bulk deliveries of office supplies received at One West Fourth each day so they may be stored in the main supply area. They also must lift boxes of supplies onto carts to stock the convenience supply rooms located on each office floor. Many boxes of supplies weigh more than Jennings' lifting restriction. Accordingly, she would not be able to perform the lifting required to put away supplies in the main storage areas or stock the convenience supply rooms. (Pierberg Decl. ¶33C; Weese Decl. ¶33C).

Conference Set-up. Support Services Assistants generally work in teams to set up the conference and special event rooms as needed for meetings or other functions held at the Firm's conference center each day. In order to configure the rooms as required for the day's events, Support Services personnel must move tables, chairs, couches, and other furniture weighing more than Jennings' lifting restriction. Jennings would not be able to accomplish her part of the lifting needed to set up conference rooms, given her lifting restriction. (Pierberg Decl. ¶33D; Weese Decl. ¶33D; Pierberg Dep. 33-36, 104-05).

Trial Trucks. Support Services Assistants must load and unload trial support trucks that, from time to time, transport supplies and equipment for use by the Firm's litigation teams. This involves lifting or rolling heavy equipment, such as projectors and scanners, as well as boxes of documents, exhibit binders, and other trial supplies that exceed Jennings' lifting restriction. (Pierberg Decl. ¶33E; Weese Decl. ¶33E).

Courier Runs. Support Services Assistants must make offsite courier runs to deliver or pickup packages. This often involves lifting boxes of documents or other large items exceeding Jennings' lifting limitation. (Pierberg Decl. ¶33F; Weese Decl. ¶33F).

Post Office Runs. A Support Services Assistant must drive to the bulk distribution center at the post office at least once a day to pick up buckets full of mail, which frequently weigh more than 20 pounds each; load these buckets into his or her vehicle; and then return to One West Fourth and unload them. Jennings' lifting limitation would prevent her from being able to pick up the mail at the post office or deliver it to the Firm. (Pierberg Decl. ¶33G; Weese Decl. ¶33G).

Mail Runs on the Floors. Support Services Assistants must sort incoming mail into crates, which are placed on carts for delivery to the office floors. From there, Support Services Assistants must push the carts to their assigned floors and deliver the mail to the addressees. While making these mail runs, Support Services Assistants must pick up outgoing mail and packages to return to the Center. Jennings' lifting limitation prevented her from lifting crates full of sorted mail or sorting, delivering, or collecting mail that exceeds her restriction. (Pierberg Decl. ¶33H; Weese Decl. ¶33H).

Express Delivery Packages. Support Services Assistants are responsible for handling incoming and outgoing express delivery packages, such as those sent by Federal Express or UPS, on a daily basis. This entails logging incoming packages and delivering them to the intended recipients within the Firm. It also involves processing outgoing packages by weighing them on a scale and creating address labels. Jennings would not be able to lift packages that exceed her lifting restriction in order to weigh them or process them for delivery. (Pierberg Decl. ¶33I; Weese Decl. ¶33I).

Office Moves. Support Services Assistants must help transport items, such as computer equipment or boxes of books, documents, and office supplies, when Firm personnel move from one office to another. Jennings' lifting limitation prevented her from being able to perform these duties. (Pierberg Decl. ¶33J; Weese Decl. ¶33J).

Hospitality and Housekeeping. Support Services personnel must deliver beverages, snacks and meals to meetings occurring throughout the Firm's offices on a daily basis. They also must keep break rooms on each floor stocked with drinks and supplies and perform related housekeeping functions. This involves lifting trays, chaffing dishes, packages, syrup boxes, CO^2 tanks, and drink containers that exceed Jennings' lifting restriction. (Pierberg Decl. ¶33K; Weese Decl. ¶33K).

File Management. Support Services Assistants must, from time to time, collect closed files and transport them to onsite storage. These files are stored in boxes that weighed more than Jennings' lifting limitation. (Pierberg Decl. ¶33L; Weese Decl. ¶33L).

Saturday Work Rotation. Support Services Assistants are scheduled, on a rotating basis, to staff the Support Service Center on Saturdays. In the 2010 time frame, only one Support Services Assistant was scheduled to work each Saturday. If Jennings worked alone in the Support Services Center, no assistance would be available should the need to lift to exceed her lifting limitation arise. Also, Jennings would have been required to perform post office runs while working Saturdays, which, as described above, she could not do as a result of her lifting limitation. (Pierberg Decl. ¶33M; Weese Decl. ¶33M).

Pierberg and Weese determined that Jennings could, on the other hand, perform the job functions described below, without exceeding her lifting limitation:

Copying and Scanning, with Assistance. Jennings was able to perform scanning and copying jobs, as long as other Support Services Assistants brought boxes of documents to the Support Services Center and removed them after the work was complete. (Pierberg Decl. ¶38A; Weese Decl. ¶41A).

Confidential Envelopes. Jennings was able to deliver confidential blue envelopes internally within the Firm. (Pierberg Decl. ¶38B; Weese Decl. ¶41B).

Quality Control. Jennings could perform quality control checks on small jobs and, if other Support Services staff were available to help with the lifting, she could perform quality control on larger projects. (Pierberg Decl. ¶38C; Weese Decl. ¶41C).

Filling in for 12th Floor Receptionist and Internal Message Center Operator. Jennings' lifting limitation did not prevent her filling in, as needed, for the main lobby receptionist on the 12th floor and the internal message center operator. (Pierberg Decl. ¶38D; Weese Decl. ¶41D).

Womble Carlyle's Efforts to Accommodate Jennings' Lifting Restriction.

Womble Carlyle initially accommodated Jennings' 10-pound lifting restriction by trying to find enough light-duty work to keep her busy. (Isley Decl. ¶¶14-15; Pierberg Decl. ¶39; Weese Decl. ¶42). In other words, the Firm excused her from performing all job functions that involved lifting more than 10 pounds and reallocated those tasks to other Support Services personnel. (Id.). She no longer, for example, filled in at Liberty Plaza or Winston Tower, did mail or supply runs to the various floors at One West Fourth, or performed other duties that would require heavy lifting. (Jennings Dep. I at 217; Jennings Dep. II at 10-17). This was intended to be a temporary solution, with the expectation that Jennings' lifting restriction might abate as she recovered from her June 2010 injury. (Id.).

Not long after Jennings' lifting restriction was implemented, the Firm's human resources department needed Support Services personnel to handle a large internal scanning project. (Isley Decl. ¶16; Pierberg Decl. ¶40; Weese Decl. ¶44). This project primarily involved scanning personnel files related to former Womble Carlyle employees and saving them on computer discs. (Id.). Pierberg and Weese determined that Jennings could work on this project, as long as others brought the boxes of files to her and removed them once the scanning was complete. (Pierberg Decl. ¶41; Weese Decl. ¶45).

Jennings estimated that, after June 2010, she spent most of her time on the internal scanning project and other copying tasks in the Center. (Jennings Dep. I at 212-216; Jennings Dep. II at 6-7). She was able to avoid lifting more than 10 pounds when completing these assignments by using modified work methods, such as removing the contents of heavy boxes, item by item, or by sliding heavy objects across work surfaces or rolling them on wheeled office chairs. (Jennings Dep. I at 134-39; Jennings Dep. II at 10-11). According to Jennings, this was how she had initially "accommodated herself" when she worked at Liberty Plaza after her breast cancer surgery. (Jennings Dep. I at 45-46, 142-48, 178-80).

In addition to the scanning and copying functions, Jennings also spent some time on other light assignments, such as filling in for the 12th floor receptionist and internal message center operator during their scheduled breaks, delivering small items, performing quality checks, binding documents, sending faxes, and helping to straighten up the Support Services Center. (Jennings Dep. II at 7-10).

After the large scanning project was finished, Weese had difficulty finding enough light-duty assignments to keep Jennings busy. (Weese Decl. ¶¶48-51). Allowing Jennings to work in a modified, light-duty position, while other employees performed all of the heavy lifting, was causing a considerable strain on the department. (Id. at ¶50). The reallocation of Jennings' lifting functions not only diminished the overall flexibility of the Support Services team, but also caused other Support Services Assistants to have to work harder on a day to day basis. (Id.). Jennings received most of the light-duty job assignments that became available, many of which were lower priority work. (Id.). This meant her co-workers had to assume additional work assignments, including more than their share of physically demanding, high priority functions. (Id.).

For these reasons, on January 18, 2011, the Firm's human resources personnel asked Jennings to provide an updated doctor's note indicating whether her lifting restriction had changed. (Isley Decl. ¶¶18-19; Jennings Dep. I at 224-25, 229-30). During this meeting, Jennings described her methods for avoiding lifting while working in the Support Services Center, i.e., removing items from heavy boxes, sliding objects on work surfaces, and using rolling chairs. (Jennings Dep. II at 89-90). Although methods such as these might reduce the lifting required for some Support Services duties, they still would not enable Jennings to accomplish all of her job functions. (Pierberg Decl. ¶¶31-33; Weese Decl. ¶¶34-36). They would not be effective, for example, when moving outgoing packages that have already been sealed for delivery, as they frequently are by the time they reach the Support Services Center. (Id.). Nor would such methods be effective for job functions involving heavy lifting outside the Center. (Id.).

Womble Carlyle received an updated doctor's note dated February 1, 2011, stating that Jennings' lifting restriction had been increased to 20 pounds. (Isley Decl. ¶20, Ex. J; Jennings Dep. I at 224-25, 232). Jennings indicated that this 20-pound limitation was permanent. (Isley Decl. ¶20, Ex. J; Pierberg Decl. ¶52; Jennings Dep. I at 227-28).

Pierberg again assessed whether Jennings would be able to perform the essential functions of the Support Services role, given the 20-pound lifting restriction. (Pierberg Decl. ¶54). She concluded that Jennings remained unable to perform, without assistance, the majority of those functions—namely, filling in at Liberty Plaza and Winston Tower, copying and scanning documents, managing supplies, setting up conference rooms, loading and unloading trial trucks, making courier and post office runs, handling mail runs to the office floors, processing express delivery packages, helping with office moves, providing housekeeping and hospitality services, managing files, and participating in the Saturday work rotation. (Id.).

Pierberg and Isley also considered whether another position might be available that would be suitable for Jennings, given her job-related skills and lifting restriction. (Isley Decl. ¶23-24; Pierberg Decl. ¶55). They identified two job positions that Jennings might be able to perform: 12th floor receptionist and internal message center operator. (Id.). Both of these positions, however, were occupied by long-term incumbents. (Id.).

After consulting with human resources personnel and conferring with Womble Carlyle's employment counsel, Pierberg ultimately determined that the Firm could not feasibly or reasonably accommodate Jennings' 20-pound lifting restriction on an ongoing basis. (Pierberg Decl. ¶56). Notably, Jennings never requested that Womble Carlyle provide her with any sort of accommodation, other than allow her to continue performing the same limited job duties which she had been assigned since June 2010 and having other employees do any necessary heavy lifting for her. (Jennings Dep. II at 29, 50).

Pierberg met with Jennings on February 9, 2011, and told her that the Firm would no longer be able to accommodate her lifting restriction in the Support Services role and, consequently, she would be placed on a medical leave of absence. (Pierberg Decl. ¶57; Jennings Dep. I at 232-35). Jennings' employment with Womble Carlyle was terminated on August 9, 2011, after she had been on medical leave for six months. (Isley Decl. ¶¶28-29, Ex. K; Pierberg Decl. ¶60; Jennings Dep. II at 24-25, Ex. 28). At that time, the Firm had identified no reasonable accommodations that would enable her to perform the majority of Support Services functions. (Id.). Nor had another position become available that would have been suitable, given her lifting restriction and job-related skills. (Id.).

QUESTIONS PRESENTED

I. Whether Jennings was able to perform the essential functions of the Support Services Assistant job, with or without reasonable accommodations.

II. Whether the Firm unlawfully denied reasonable accommodations to Jennings.

ARGUMENT

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Fed. R. Civ. P.; Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). When considering motions for summary judgment, courts must view facts and inferences in the light most favorable to the non-movant. Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986).

However, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986). The moving party on a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the non-movant can prove her case. Cray Communications v. Novatel Computer Sys., 33 F.3d 390, 393-94 (4th Cir. 1994). This is consistent with "one of the principal purposes of the summary judgment rule"—namely, "to isolate and dispose of factually unsupported claims or defenses." Celotex, 477 U.S. at 323-24.

The EEOC brings its claims under the ADA, which prohibits discrimination against "a qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). To establish a violation, the EEOC must show that Jennings had a disability; that she was an otherwise qualified individual; and that she was subjected to unlawful discrimination. Tyndall v. National Educ. Ctrs., 31 F.3d 209, 212 (4th Cir. 1994). One form of discrimination prohibited by the ADA is failing to make a reasonable accommodation for a qualified individual with a disability, 42 U.S.C. § 12112(b)(5)(A), which is what the EEOC alleges here. The EEOC, however, cannot present sufficient evidence for a reasonable jury to find that Jennings was an otherwise qualified individual or that Womble Carlyle denied her a reasonable accommodation.

I. The EEOC cannot establish that Jennings was a qualified individual with a disability within the meaning of the ADA.

A "qualified individual with a disability" is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m). The term "essential job functions" means "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. § 1630.2(n)(1). A job function is "essential" when it bears more than a marginal relationship to the job at issue. Rohan v. Networks Presentations, 375 F.3d 266, 279 (4th Cir. 2004). An employer may specify multiple essential duties for a position, as Womble Carlyle has done here, and expect employees to rotate through duties. Gratzl v. Office of Chief Judges, 601 F.3d 674, 679 (7th Cir. 2010). In that event, a disabled employee will not be qualified for the position unless she can perform enough of these duties to enable a judgment that she can perform its essential functions. Id. (internal citation omitted).

Relevant factors when determining whether job functions are essential include the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring the incumbent to perform the function, the work experience of past incumbents in the job and current incumbents in similar jobs. 29 C.F.R. § 1630.2(n)(3)(i), (iii); *see also* 42 U.S.C. § 12111(8). The employer's judgment about an essential job function "is considered highly probative." Duello v. Buchanan County Board of Supervisors, 628 F.3d 968, 972 (8th Cir. 2010).

Here, the record evidence demonstrates that Support Services Assistants must be able to rotate among multiple job functions, many of which require lifting over 20 pounds. The job description prepared by Womble Carlyle lists the various responsibilities associated with the multi-function position and states that lifting up to 75 pounds is required. Both Pierberg and Weese affirm that Support Services Assistants must be able to fulfill enough of the multiple job functions in order to enable the Support Services department, as a whole, to meet its customer service objectives. (Pierberg Decl. ¶¶10-18; Weese Decl. ¶¶10-18). They also make clear that, in order to perform these functions, Support Services Assistants must regularly lift objects weighing 20 to 50 pounds and, moreover, might need to lift as much as 75 pounds from time to time. (Id.). The deposition testimony of other Support Services Assistants shows that they must rotate as needed among the various job functions, many of which require lifting more than 20 pounds. (Bunjang Dep. 23-64; Million Dep. 14-51; Mulalic Dep. 10-37, 44).

Jennings' own work experience bears this out. The EEOC cannot credibly deny that Jennings lifted more than 20 pounds in the course of her regular job duties, since this was precisely how she injured her shoulder in June 2010. (Jennings Dep. I at 145-47, 188-96, Ex. 21). Jennings further admits that in the limited time she worked full-duty at One West Fourth,[2] she performed Support Services functions that required lifting over 10 or 20 pounds, such as handling mail and supply runs, processing FedEx packages, and making post office runs while working Saturday rotations. (Jennings Dep. I at 109-54.)

[2] Jennings did not work a full schedule at One West Fourth until after she was placed in a light-duty assignment in June 2010. (Jennings Dep. II at 39).

She also received training on conference set-ups and helped to provide hospitality services, even though she claims both of these tasks were typically assigned to other Support Services Assistants. (Id. at 109-16; Jennings Dep. II at 13).

That Jennings might not have regularly performed some of the Support Services duties (even if others were typically assigned to perform them) does not render these functions any less essential to the position. *See* Alexander v. Northland Inn, 321 F.3d 723, 727 (8th Cir. 2003) (vacuuming was essential job function, even though the plaintiff vacuumed less frequently than other employees); Peters v. City of Mauston, 311 F.3d 835, 845 (7th Cir. 2002) (heavy lifting was essential function of laborer job, even though plaintiff testified it was required only infrequently); Dropinski v. Douglas County, Neb., 298 F.3d 704, 708-09 (8th Cir. 2002) (although plaintiff claimed he "never performed" some of the job functions, they were still essential because he "may be required" to perform them); Summerville v. Trans World Airlines, 219 F.3d 855, 858-59 (8th Cir. 2000) (assisting passengers was essential job function, despite the plaintiff's contention that it required only a few minutes each week and other employees were available to help). Nor does Womble Carlyle's decision to temporarily excuse Jennings from certain functions, due to her lifting restrictions, mean that those functions are non-essential. Phelps v. Optima Health, 251 F.3d 21 (1st Cir. 2001) (employer's decision to excuse employee, due to lifting restrictions, from performing aspects of multi-task job does not mean the tasks to which she was not assigned are not essential functions). Given her inability to perform most of the Support Services functions, in light of her lifting limitation, the EEOC cannot establish that Jennings is a qualified individual with a disability under the ADA. 42 U.S.C. § 12111(8).

II. The EEOC cannot demonstrate that Womble Carlyle unlawfully failed to make reasonable accommodations for Jennings' lifting restrictions.

To establish a claim for failure to accommodate, the EEOC must, at a minimum, identify a reasonable accommodation that was denied Jennings. Rhoads v. FDIC, 257 F.3d 373, 387, n. 11 (4th Cir. 2001). Jennings never requested—and the EEOC cannot identify—any reasonable accommodation that would have enabled her to do her job. As the Firm has shown, the only way Jennings could have continued in her Support Services role was to excuse her from performing essential job functions that required lifting more than 20 pounds, thereby creating a modified, light-duty position, and reallocate to other Support Services personnel all of the duties that required heavy lifting.

The duty to provide accommodations, however, does not require an employer to eliminate essential job functions, Myers v. Hose, 50 F.3d 278, 284 (4th Cir. 1995), or create a permanent light-duty or part-time position that does not otherwise exist. Lamb v. Qualex, 33 Fed. Appx. 49, 59, 2002 WL 500492, at *9 (4th Cir. 2002). Nor does it require an employer to reallocate to other workers the essential functions of a disabled individual's job, 29 C.F.R. Part 1630, App. § 1630.2(o), or make accommodations that otherwise require other employees to work harder or longer. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1094 (5th Cir. 1996); *see also* Peters, 311 F.3d at 845 (having someone else do heavy lifting for plaintiff was not reasonable accommodation because it required another person to perform essential function of plaintiff's job). These principles hold true even when an employer voluntarily exceeded the ADA's requirements by providing such an accommodation in the past, as Womble Carlyle did for Jennings. Winfrey v. City of Chicago, 259 F.3d 610, 616 (7th Cir. 2001) (employer that "bends over backwards" to accommodate disabled worker "must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation") (internal citation omitted); Holbrook v. City of Alpharetta, Ga., 112 F.3d 1522, 1528 (11th Cir. 1997) (city employer need not continue to accommodate police officer by eliminating essential job function).

Although reasonable accommodations may, in some instances, include a transfer to a vacant position, the EEOC cannot point to any available job at Womble Carlyle that Jennings was able to perform, given her job-related skills and lifting restriction. The Firm identified two positions that might be suitable, but neither was vacant. The ADA does not require employers to "bump" an employee from an existing position in order to accommodate a person with a disability. EEOC v. Sara Lee Corp., 237 F.3d 349, 355 (4th Cir. 2011). Consequently, the EEOC can identify no reasonable accommodation that the Firm denied to Jennings, and consequently its ADA claim fails as a matter of law. Lamb, 33 Fed. Appx. 49, 59, 2002 WL 500492, at *9.

CONCLUSION

As described herein, no genuine issue of material fact exists and Womble Carlyle is entitled to judgment as a matter of law. Accordingly, the Firm respectfully requests that the Court grant summary judgment in its favor.

This the 30th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2014 I electronically filed this **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **Darryl L. Edwards (darryl.edwards@eeoc.gov).**

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